

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

FEB 15 2008

COURT OF APPEALS
DIVISION TWO

GARY BLUEMKE,

Plaintiff/Appellant,

v.

UNIVERSITY OF ARIZONA POLICE
PENSION BOARD, an administrative
body,

Defendant/Appellee.

2 CA-CV 2007-0023
DEPARTMENT B

MEMORANDUM DECISION

Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20052728

Honorable Sarah R. Simmons, Judge

AFFIRMED

Watters Law Firm, P.C.
By Adam W. Watters

Tucson
Attorney for Plaintiff/Appellant

Goering, Roberts, Rubin, Brogna,
Enos & Treadwell-Rubin, P.C.
By Pamela Treadwell-Rubin and Elizabeth Warner

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E C K E R S T R O M, Presiding Judge.

¶1 Appellant Gary Bluemke, a former University of Arizona police officer, filed a claim for accidental disability benefits, which the University of Arizona Police Pension Board denied. Bluemke then filed a complaint in superior court for judicial review of the Board's decision. The superior court upheld the Board's determination and now Bluemke appeals from that decision. He argues the Board's determination that he suffers from a pre-existing condition was not supported by substantial evidence. He also contends the Board abused its discretion by ignoring the undisputed medical evidence that established he has a mental disability, which was caused by his employment conditions. For the following reasons, we affirm the judgment of the superior court.

¶2 We view the evidence in the light most favorable to upholding the superior court's decision. *See Weller v. Ariz. Dep't of Econ. Sec.*, 176 Ariz. 220, 224, 860 P.2d 487, 491 (App. 1993). Bluemke began his employment with the University of Arizona Police Department (UAPD) in May 1996. In July 2003, he transferred from his position as a patrol officer for UAPD to the Metropolitan Area Narcotics Trafficking Interdiction Squad (MANTIS),¹ where he acted as a "first responder."

¶3 Before his transfer, Bluemke "was concerned about going to MANTIS because [his] ex-wife Linda had also worked at the MANTIS [building]." After gaining his ex-wife's "approval," however, Bluemke transferred because he "thought it would be a good move."

¹MANTIS was created by an intergovernmental agreement as a collaborative regional law enforcement agency. *See Callan v. Bernini*, 213 Ariz. 257, n.1, 141 P.3d 737, 738 n.1 (App. 2006); *In re \$26,980.00 U.S. Currency*, 193 Ariz. 427, n.1, 973 P.2d 1184, 1185 n.1 (App. 1998).

While at MANTIS Bluemke saw his ex-wife every day, and he regularly saw his ex-wife with her new husband, a man with whom she had had an affair during her marriage to Bluemke. Bluemke claimed that “seeing them together made [him] feel anxious, embarrassed, and worthless.”

¶4 Eventually, Bluemke could not sleep and became suicidal. According to Bluemke, his anxiety and depression caused him to begin “acting out” through exhibitionism. In December 2003, he was arrested for indecent exposure in a store parking lot.² The arrest report was forwarded to UAPD.

¶5 Immediately after his arrest, Bluemke discussed the situation with two UAPD superior officers. He told them he had been depressed and his “acting out” was a consequence of that depression. UAPD placed Bluemke on investigative leave the day after his arrest and he began seeing a therapist six days later. After the department completed its investigation, it issued a letter to Bluemke that informed him he would be terminated. He was told he could “come back [four days later] to refute the charges” before the chief made a final decision. Bluemke did return four days later but resigned at that time.

¶6 On September 13, 2004, Bluemke applied for an accidental disability pension from the Public Safety Personnel Retirement System, stating the nature and cause of his disability was “Extreme Anxiety and Extreme Depression [caused by his] Assignment to Mantis.” His application included letters from a psychiatrist, a family practice physician,

²Although we have not been provided a copy of the citation or a police report describing the incident, for purposes of this appeal we presume Bluemke’s statement about his arrest, which was taken from a psychiatrist’s report, is accurate.

and a therapist. Marshall Jones, a psychiatrist who had seen Bluemke five times between April and August 2004, diagnosed him with “Generalized Anxiety with Obsessive Traits” and “Major Depression.” Jones opined that Bluemke’s obsessive-compulsive traits “are significantly biologically based,” and that his depression and anxiety, as well as his personal problems, “were aggravated by his unfortunate assignment to the MANTIS Program.” Gary Perrin, a psychologist who had treated Bluemke since December 2003, stated in his letter that he agreed with Jones’s “descriptions and conclusions regarding Mr. Bluemke.” Lionel Duarte, a family practice physician who had been treating Bluemke since March 2004, diagnosed Bluemke with anxiety and depression and observed that “his condition was aggravated by his assignment with the mantis unit.” The Board met on November 24, 2004, and denied Bluemke’s application for an accidental disability pension.

¶7 Bluemke requested the Board reconsider the matter and it held a hearing on December 15, 2004, to hear Perrin’s testimony and determine whether Bluemke’s disability was work related. At the end of the hearing, the Board voted to send Bluemke to a mental health professional “of [its] choosing” for evaluation. As a result, psychiatrist John LaWall evaluated Bluemke. LaWall determined that Bluemke was currently suffering from “generalized anxiety disorder with additional elements of social anxiety and obsessive compulsive personality traits” and had a “history of adjustment disorder with depressed mood, now resolved.” LaWall accepted as plausible Bluemke’s statement that his mental condition “was caused or exacerbated by his assignment to MANTIS [and] contact with his ex-wife” and therefore found “a reasonable medical probability that his condition is

significantly related to his job as a peace officer.” LaWall also noted that Bluemke had “a pre-existing condition including the social anxiety and obsessive compulsive traits,” but stated that such condition “did not result in any treatment or significant impairment prior to the events that occurred on the job.”

¶8 When the Board subsequently asked LaWall whether his opinion would change if he knew Bluemke had voluntarily transferred to MANTIS, LaWall wrote that Bluemke’s insight was so poor he would not have known how troublesome the transfer might become, and therefore, his “volunteering has no bearing on causation.” Most of the Board members who attended a subsequent meeting did not feel LaWall had persuasively addressed the question of causation. The Board then held a discussion and voted to deny Bluemke’s application for an accidental disability pension.

¶9 Bluemke filed a complaint in Pima County Superior Court for judicial review pursuant to the Administrative Review Act. *See* A.R.S. §§ 12-901 through 12-914. The court remanded the case to the Board with directions to clarify the reason it had denied Bluemke’s application, and after the Board did so, the superior court found the Board had (1) “looked at the appropriate questions,” (2) “clearly indicated that the majority of the members believed that Mr. Bluemke was not terminated by reason of accidental disability,” and (3) found Bluemke had not met all the necessary criteria for granting the disability pension. For those reasons, the court upheld the decision of the Board.

¶10 The day after the court entered its order in the case, Division One of this court decided *Parkinson v. Guadalupe Public Safety Retirement Local Board*, 214 Ariz. 274,

151 P.3d 557 (App. 2007). Bluemke filed a motion for new trial pursuant to Rule 59, Ariz. R. Civ. P., arguing *Parkinson* required the court to “reconsider its decision, overturn the UA Police Pension Board, and order that Mr. Bluemke receive his disability benefits.” The court denied his motion, finding *Parkinson* inapplicable, and this appeal followed.

¶11 Bluemke argues that the Board’s conclusion he had a pre-existing medical condition when his employment with UAPD began is not supported by substantial evidence. In an appeal to superior court of an administrative decision, the superior court reviews the administrative action to determine whether it “was illegal, arbitrary, capricious or involved an abuse of discretion.” *Smith v. Ariz. Long Term Care Sys.*, 207 Ariz. 217, ¶ 19, 84 P.3d 482, 486 (App. 2004). We will uphold the superior court’s decision “if the record contains supporting evidence.” *Parkinson*, 214 Ariz. 274, ¶ 13, 151 P.3d at 560. “If the administrative body’s consideration permits two different conclusions, the decision is neither arbitrary nor capricious even if we believe it to be erroneous.” *Id.*

¶12 Section 38-844(B), A.R.S., provides that a qualified employee, or “member” of the state retirement system “is eligible for an accidental disability pension if the member’s employment is terminated by reason of accidental disability.” An “accidental disability” includes a “mental condition which the local board finds totally and permanently prevents an employee from performing a reasonable range of duties within the employee’s job classification and was incurred in the performance of the employee’s duty.” A.R.S. § 38-842(1). But, “no member shall qualify for an accidental . . . disability pension if the local board determines that the member’s disability results from . . . [a] physical or mental

condition or injury that existed or occurred prior to the member's date of membership in the system." § 38-844(D)(3); *see also Parkinson*, 214 Ariz. 274, ¶ 18, 151 P.3d at 561 (member eligible for disability pension if local board "finds that he suffers a medically documented disability, that such disability is a cause of his decision to terminate employment and that he is not disqualified by any other statutory provisions").

¶13 Here, the record contains evidence that Bluemke had a pre-existing mental condition, which disqualified him from receiving an accidental disability pension. LaWall diagnosed Bluemke with "generalized anxiety disorder with additional elements of social anxiety and obsessive compulsive personality traits." But as to whether the condition "was incurred in the performance of [Bluemke]'s duty," § 38-842(1), LaWall stated only that he found plausible Bluemke's "statement that this condition was caused *or exacerbated* by his assignment to MANTIS, contact with his ex-wife, etc." (Emphasis added.)

¶14 Similarly, the reports Bluemke submitted from his own doctors do not attribute the assignment to MANTIS as the cause of his mental condition, but rather as an aggravator of it. Jones linked Bluemke's obsessive compulsive traits to biology and stated his anxiety and depression were "aggravated" by his assignment to MANTIS. Perrin simply stated he agreed with Jones's conclusions; Duarte opined that Bluemke's condition had been "aggravated" by his assignment to MANTIS. The Board reasonably could infer from these opinions that the relevant experts themselves believed Bluemke's condition existed before

the MANTIS assignment.³ And in the last paragraph of his report, LaWall stated “there was a pre-existing condition including the social anxiety and obsessive compulsive traits already referred to earlier.”⁴ These statements, taken together, constitute reasonable evidence to support the Board’s finding that Bluemke’s disability resulted from a “physical or mental condition or injury that existed or occurred prior to [his] date of membership in the system.” § 38-844(D)(3). And even assuming the Board did not base its denial of Bluemke’s claim on the existence of a pre-existing condition, the superior court was entitled to affirm the Board’s decision on any ground reasonably supported by the evidence. *See Kovacs v. Indus. Comm’n*, 132 Ariz. 173, 176, 644 P.2d 909, 912 (App. 1982).

¶15 In the same vein, Bluemke argues the Board ignored LaWall’s report and thereby abused its discretion. *See* A.R.S. § 38-859(C) (finding of accidental disability must be based on medical evidence from doctor appointed by board). But as we stated above,

³Although Bluemke correctly notes none of the doctors expressly stated his condition existed before 1996, Bluemke does not argue his condition arose between 1996 and 2003 during his employment as a patrol officer for UAPD but before his assignment to MANTIS.

⁴Bluemke emphasizes two facets of LaWall’s report in support of his claim that there is no evidence he suffered from a pre-existing condition. First, he states LaWall does not specifically link generalized anxiety disorder and depression to social anxiety and compulsive behavior. But, as we have stated, LaWall’s report, read in its entirety and in conjunction with the reports of the other doctors, connects Bluemke’s current condition to his pre-existing one. Second, Bluemke points out LaWall found his social anxiety and compulsive behavior “did not result in any treatment or significant impairment prior to the events that occurred on the job already referred to.” We are unaware of any authority for the proposition that a condition is not pre-existing for purposes of § 38-844(C) unless the person previously had been treated for the condition or the person had been significantly impaired because of it. And in any event, it was the Board’s duty to resolve any conflicts in the medical evidence. A.R.S. § 38-859(C).

there was evidence in the record, including LaWall's report, supporting the Board's determination that Bluemke's condition predated his employment with UAPD. Therefore, even if LaWall had found a disability had been "incurred in the performance of [his] duty" as a police officer, § 38-842(1), Bluemke was disqualified from receiving the pension because of his pre-existing condition, *see Parkinson*, 214 Ariz. 274, ¶ 17, n.6, 151 P.3d at 560-61, 561 n.6. Clearly, the Board considered LaWall's report. And although Bluemke interprets LaWall's report differently, we may not set aside the Board's determination on that basis. *See* § 38-859(C) (board resolves conflicts in medical evidence); *Parkinson*, 214 Ariz. 274, ¶ 13, 151 P.3d at 560 (even if we believe a decision is erroneous, we may not reverse the administrative body's decision if the record permits two different conclusions).

¶16 Accordingly, we affirm the superior court's ruling.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge